



Federal Communications Commission
Washington, D.C. 20554

July 5, 2019

Emma Best
MuckRock News
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Re: FOIA Control No. 2019-446

Ms. Best:

This letter responds to your Freedom of Information Act (FOIA) request for, "documents generated as part of the creation of the FOIA office (defined as whatever department, office, or coordinator is responsible for overseeing and/or processing FOIA requests), whether this was at the time of the agency's creation or the passage of the Freedom of Information Act, to include: 1. The instruction to do so from the Agency, as well as any guidance from the senior leadership 2. Documents discussing proposals and procedures 3. Any legal guidance or analysis produced or acquired by the Agency in response to or as part of the creation of the FOIA office 4. Internal documents from the press office, legislative liaison's office (or equivalent), general counsel's office (or equivalent), director's office (or equivalent) or the newly created FOIA office, reacting to or characterizing the office and its creation. * A copy of the agency's first perfected (successful) FOIA request * Copies of other FOIA requests filed before the FOIA request described above * Processing notes, search slips and response documents regarding the FOIA requests described above * The first set of guidelines, instructions and/or forms created to control the agency's processing of FOIA requests * A copy of the agency's first successful FOIA appeal * Copies of other FOIA appeals received by the agency before the appeal described above * Processing notes, search slips and response documents regarding the FOIA appeals described above * The first set of guidelines, instructions and/or forms created to control the agency's processing of FOIA appeals." Your request has been assigned FOIA Control No. 19-446.

The Office of the Managing Director conducted a search and found records responsive to your request after Executive Order 13392. Specifically, these records respond to your request for guidance from senior leadership, proposals and procedures, and forms created to control the agency's processing of FOIA requests. With the exception of the records withheld under Exemption 5, the records include:

- Designation of FCC's Chief FOIA Officer

- FCC FOIA Reference Guide – July 2007
- Improving Agency Disclosure of Information) Agency-Specific Plan dated June 14, 2006
- Quick FOIA Fact Sheet
- Updated Status Report – FOIA Improvement Plan dated July 30, 2007

The other records you seek were destroyed in accordance with General Records Schedule 4.2.

Records responsive to your request were withheld under FOIA Exemption 5.¹ Exemption 5 protects certain inter-agency and intra-agency records that are normally considered privileged in the civil discovery context. Exemption 5 encompasses a deliberative process privilege intended to “prevent injury to the quality of agency decisions.”² To fall within the scope of this privilege the agency records must be both predecisional and deliberative.³ Predecisional records must have been “prepared in order to assist an agency decision maker in arriving at his decision.”⁴ Deliberative records must be such that their disclosure “would expose an agency’s decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.”⁵ The withheld records consist of documents specifying the FOIA process and e-mails discussing edits to draft documents.

We are required by both the FOIA and the Commission’s own rules to charge requesters certain fees associated with the costs of searching for, reviewing, and duplicating the sought after information.⁶ To calculate the appropriate fee, requesters are classified as: (1) commercial use requesters; (2) educational requesters, non-commercial scientific organizations, or representatives of the news media; or (3) all other requesters.⁷

Pursuant to section 0.466(a)(5)-(7) of the Commission’s rules, you have been classified as category (2), “educational requesters, non-commercial scientific organizations, or representatives of the news media.”⁸ As an “educational requester, non-commercial

¹ 5 U.S.C. § 552(b)(5).

² *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975).

³ *Id.* at 151-52.

⁴ *Formaldehyde Inst. v. Dep’t of Health and Human Servs.*, 889 F.2d 1118, 1122 (D.C. Cir. 1989); *see also Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (“In deciding whether a document should be protected by the privilege we look to whether the document is . . . generated before the adoption of an agency policy and whether . . . it reflects the give-and-take of the consultative process. The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents. . .”).

⁵ *Formaldehyde Inst.*, 889 F.2d at 1122 (quoting *Dudman Commc’ns Corp. v. Dep’t of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)).

⁶ *See* 5 U.S.C. § 552(a)(4)(A), 47 C.F.R. § 0.470.

⁷ 47 C.F.R. § 0.470.

⁸ 47 C.F.R. § 0.466(a)(5)-(7).

scientific organization, or representative of the news media," the Commission assesses charges to recover the cost of reproducing the records requested, excluding the cost of reproducing the first 100 pages. The production in response to your request did not involve more than 100 pages of duplication. Therefore, you will not be charged any fees.

You have requested a fee waiver pursuant to section 0.470(e) of the Commission's rules.⁹ As you are not required to pay any fees in relation to your FOIA request, the Office of the General Counsel, which reviews such requests, does not make a determination on your request for a fee waiver.¹⁰

If you consider this to be a denial of your FOIA request, you may seek review by filing an application for review with the Office of General Counsel. An application for review must be *received* by the Commission within 90 calendar days of the date of this letter.¹¹ You may file an application for review by mailing the application to Federal Communications Commission, Office of General Counsel, 445 12th St SW, Washington, DC 20554, or you may file your application for review electronically by e-mailing it to FOIA-Appeal@fcc.gov. Please caption the envelope (or subject line, if via e-mail) and the application itself as "Review of Freedom of Information Action."

If you would like to discuss this response before filing an application for review to attempt to resolve your dispute without going through the appeals process, you may contact the Commission's FOIA Public Liaison for assistance at:

FOIA Public Liaison
Federal Communications Commission, Office of the Managing Director,
Performance Evaluation and Records Management
445 12th St SW, Washington, DC 20554
202-418-0440
FOIA-Public-Liaison@fcc.gov

If you are unable to resolve your FOIA dispute through the Commission's FOIA Public Liaison, the Office of Government Information Services (OGIS), the Federal FOIA Ombudsman's office, offers mediation services to help resolve disputes between FOIA requesters and Federal agencies. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740-6001

⁹ 47 C.F.R. § 0.470(e).

¹⁰ 47 C.F.R. § 0.470(e)(5).

¹¹ 47 C.F.R. §§ 0.461(j), 1.115; 47 C.F.R. § 1.7 (documents are considered filed with the Commission upon their receipt at the location designated by the Commission).

202-741-5770
877-684-6448
ogis@nara.gov
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Sincerely,

Vanessa Lamb SK

Vanessa Lamb
Acting Associate Managing Director
Performance Evaluation and Records
Management

Enclosures